MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd

HIGH COURT (KUCHING) — COMPANIES (WINDING-UP) NO KG 3 OF 1992/III
CHONG SIEW FAI J
23 NOVEMBER 1992

Companies and Corporations *— Winding up — Petition — Service — Affidavit of service stated that petition was served by leaving copy at the registered office of the company — Affidavit did not state that no member, officer or servant of company could be found at the registered office — Affidavit insufficient — Companies (Winding-up) Rules 1972 r 25(1)*

This is an application to set aside a winding up order made against the respondent on the ground that the service of the petition was bad, ineffective and ought to be set aside. At all material times, the registered office of the respondent as shown on the record kept by the Registry of Companies was Suite 2001, 20th Floor, Wisma Hamzah-Kwong Hing, 1 Leboh Ampang, 50100 Kuala Lumpur. The affidavit of service stated that the petition was served by leaving a copy thereof at the registered office. It did not say that no member, officer or servant of the company could be found at the registered office. The respondent argued that the company 'was no longer there' and that the petitioner knew that the principal place of business of the company was at Kuching. However, no notice of the cancellation or change of the registered office of the company had been lodged with the Registrar of Companies as required under the Companies Act 1965.

Held, allowing the application:
Since the petitioner chose to effect service of the petition by leaving a copy thereof at the registered office, it must be clearly established by evidence in the affidavit of service or otherwise that at the time of leaving the copy at the company's registered office, no member, officer or servant of the company could be found in the registered office. In this case, such evidence is lacking. The affidavit of service merely stated that the address was occupied by another company and he gave no date of his inspection. The affidavit of service ought to state not merely that no officer or servant, but also that no member of the company could be found at the registered office. The service therefore had not complied with the Companies (Winding-up) Rules 1972.

Obiter:
No notice of the cancellation or change of the registered office of the respondent company had been lodged with the Registry of Companies as required under s 120(1) of the Companies Act 1965. In the circumstances, it is not open to the company to rely on the event of the cancellation or change against the petitioner, particularly so when

it is not shown that the petitioner had knowledge of the cancellation or change at the material time, and when service was otherwise properly effected at its former registered office. Even if the petitioner knew that the respondent's principal place of business was somewhere else, it would not preclude the petitioner from employing an alternative, equally authorized method of service at the registered office of the company, provided service was duly and properly carried out in accordance with the Companies (Winding-up) Rules 1972.

[Bahasa Malaysia summary

Ini adalah suatu permohonan untuk mengetepikan suatu perintah penggulungan yang telah dibuat terhadap penentang atas alasan bahawa penyampaian petisyen adalah salah, tidak berkesan dan sepatutnya diketepikan. Pada masa yang material, pejabat berdaftar pihak penentang seperti yang ditunjukkan dalam rekod yang disimpan oleh Pejabat Pendaftaran Syarikat adalah Suite 2001, 20th Floor, Wisma Hamzah-Kwong Hing, 1 Leboh Ampang, 50100 Kuala Lumpur. Afidavit penyampaian menyatakan bahawa petisyen itu disampaikan dengan meninggalkan sesalinan afidavit itu di pejabat berdaftar itu. Ia tidak menyatakan bahawa tidak terdapat ahli, pegawai atau penjawat syarikat itu yang dapat dijumpai di pejabat berdaftar itu. Penentang berhujah bahawa syarikat itu 'was no longer there' dan bahawa pempetisyen mengetahui bahawa tempat berniaga utama syarikat itu berada di Kuching. Tetapi, notis pembatalan atau penukaran pejabat berdaftar syarikat itu tidak diserah-simpan dengan Pendaftar Syarikat seperti yang di-kehendaki oleh Akta Syarikat 1965.

Diputuskan, membenarkan permohonan itu:
Memandangkan bahawa pempetisyen memilih supaya petisyen di-sampaikan dengan cara meninggalkan sesalinan petisyen itu di pejabat berdaftar syarikat itu, mestilah ditunjukkan dengan jelas oleh keterangan dalam afidavit penyampaian atau tidak bahawa pada masa meninggalkan sesalinan afidavit itu di pejabat berdaftar syarikat itu, tidak terdapat ahli, pegawai atau penjawat syarikat itu yang dapat dijumpai di pejabat berdaftar itu. Di dalam kes ini, tidak terdapat keterangan sedemikian. Afidavit penyampaian hanya menyatakan bahawa alamat itu didiami oleh sebuah syarikat yang lain dan beliau tidak memberi tarikh pemeriksaan. Afidavit penyampaian sepatutnya menyatakan bukan sahaja bahawa tidak terdapat pegawai atau penjawat, tetapi juga bahawa tidak terdapat ahli syarikat itu yang dapat dijumpai di pejabat berdaftar itu. Oleh itu, penyampaian itu tidak mematuhi Kaedah-Kaedah (Penggulungan) Syarikat 1972.

Obiter:
Notis pembatalan atau penukaran pejabat berdaftar syarikat penentang tidak diserah-simpan dengan Pendaftar Syarikat seperti yang di-kehendaki oleh s 120(1) Akta Syarikat 1965. Di dalam keadaan sedemikian, syarikat itu tidak boleh bergantung kepada perihal pem-

batalan atau penukaran terhadap pempetisyen, lebih-lebih lagi apabila tidak ditunjukkan bahawa pempetisyen mengetahui mengenai pembatalan atau penukaran itu pada masa yang material itu, dan apabila penyampaian itu selainnya telah dilaksanakan dengan betul di pejabat berdaftar yang lama. Walaupun pempetisyen mengetahui bahawa tempat berniaga utama penentang berada di tempat yang lain, ini tidak akan menghalang pempetisyen daripada menyampaikan afidavit, secara alternatif dan juga dengan cara yang dibenarkan, pada pejabat berdaftar syarikat itu, asalkan penyampaian itu dilaksanakan seperti yang sepatutnya dan secara betul berdasarkan Kaedah-Kaedah (Penggulungan) Syarikat 1972.]

Cases referred to

1 *Ross v Invergordon Distillers Ltd* 1961 SC 286 (refd)
2 *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68 (refd)
3 *Re Hatcham Motor Garage Co* (1916) 32 TLR 399 (folld)

Legislation referred to

Companies (Winding-up) Rules 1972 r 25(1)

Christina Eng (*CJ Eng*) for the respondent.
John Lim (*Tiong Lim Wong & Co*) for the petitioner.

Cur Adv Vult

Chong Siew Fai J: By a notice of motion dated 5 November 1992 the applicant, Golden Hornbill Hotel Sdn Bhd ('the company') applies to set aside the winding up order made against it on 25 September 1992 at the instance of Mui Bank Bhd ('the petitioner').

The petitioner opposes the application.

The petition for winding up of the company based on the ground of inability to pay its debt after demand, was taken out on 22 May 1992. The affidavit of service of one Suhairi bin Ujang shows that the petition was served by leaving a copy thereof at the registered office of the company. The relevant part of his affidavit affirmed on 27 July 1992 reads:

> 2 I did on Tuesday 21 July 1992 serve a true copy of the petition dated 22 May 1992 on Golden Hornbill Hotel Sdn Bhd by leaving a copy of the said petition at the registered address at Suite No 2001, 20th Floor, Wisma Hamzah-Kwong Hing, No 1, Leboh Ampang 50100 Kuala Lumpur.

The petition was heard on 25 September 1992 and the winding up order was made on the same day in the absence of any representative of the company.

The sole ground of the application, as contended for the applicant, is the service of the petition. It was submitted that the service was bad, ineffective and ought to be set aside.

The evidence adduced clearly establishes that at all material times, more particularly at the time of the service of the petition, the registered office of

the company, as shown on the record kept by the registry of companies, was Suite 2001, 20th Floor Wisma Hamzah-Kwong Hing, 1, Leboh Ampang, 50100 Kuala Lumpur. Although in his affidavit affirmed on 31 October 1992, Sim Yong Pheng, a director of the company, stated that the registered office of the company was, at the material time, 'no longer there', there is no evidence that notice of the cancellation or change of the registered office of the company had been lodged with the Registrar of Companies as required under s 120(1) of the Companies Act 1965 ('the Act'). Indeed it was admitted that this was not done. In the circumstance it is not open to the company to rely on the event of the cancellation or change against the petitioner, particularly so when it is not shown that the petitioner had knowledge of the cancellation or change at the material time. In other words, a company that has changed its registered office without notifying the Registrar of Companies as required by s 120(1) of the Act cannot rely upon the cancellation or change to defeat a service that was properly effected at its former registered office, especially when the fact of the cancellation or change is not known to the petitioner at the time of the service. There is no change of the registered office until notice has been given. *Ross v Invergordon Distillers Ltd*;[1] *Summit Company (M) Sdn Bhd v Nokko Products (M) Sdn Bhd.*[2]

For the company, it was submitted that the petitioner knew that the principal place of business of the company was at Kuching. This, even if true, would not, in my opinion, preclude the petitioner from employing an alternative, equally authorized method of service at the registered office of the company, provided service was duly and properly carried out in accordance with the rule.

Notwithstanding the above, the crucial question remains: had service of the petition in this case complied with the relevant provisions in the Companies (Winding-up) Rules 1972? Rule 25(1) thereof reads:

> *Every petition shall,* unless presented by the company, *be served upon the company at the registered office of the company,* and if there is no registered office, then at the principal or last known principal place of business of the company, if can be found, *by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer or servant can be found there, then by leaving a copy at the registered office* or principal place of business, or by serving it on such member or members of the company as the Court may direct; ... (Emphasis added.)

Service of process is an essential procedural step in properly constituted judicial proceedings. Its object is to give notice to the party who will or may be affected by the court's judgment or order, so that he may be aware of, and may, if he so wishes, resist, that which is sought against him. The courts are always cautious to see that a defendant or respondent is fully apprised of the proceedings, if possible, before making any order against him. Rule 25(1), therefore, although directory in nature, ought to be properly and carefully adhered to.

In our instant case, the company had its registered office in Wisma Hamzah-Kwong Hing, No 1, Leboh Ampang, Kuala Lumpur as is more particularly shown in the record kept by the Registry of Companies. Since

the petitioner chose to effect service of the petition by leaving a copy thereof at the registered office, it must be clearly established by evidence in the affidavit of service or otherwise that at the time of leaving the copy at the company's registered office, no member, officer or servant of the company could be found in the registered office. Such evidence, however, is singularly lacking. The affidavit of Yeoh Hock Thong, affirmed on 4 November 1992, said no more than that the address was occupied by another company and he gave no date of his inspection.

In *Re Hatcham Motor Garage Co*,[3] the petition was served by leaving a copy thereof at the registered office of the debtor-company, the affidavit of service stated that no officer or servant was at the registered office without stating that no member could be found there. On a construction of r 28 of the Companies (Winding-up) Rules 1909, the relevant part of which is similar to our r 25(1) quoted above, it was held that the affidavit was insufficient. In other words, in such a situation, the affidavit of service ought to state (if that is the fact) not merely that no officer or servant, but also that no member of the company could be found at the registered office.

In our instant case, the affidavit of service made no mention at all about the absence of the company's personnel of the above three categories at the company's registered office. It may be that at the time of service, none of them was there or that the server made no attempt to find out whether any of them was present. It would not be right for me to speculate. On the evidence available and for the above reasons, I am constrained to allow the motion. The winding up order made on 25 September 1992 is set aside.

As regards costs, the company, in my view, is partly to blame for failing to take due and proper step to effect the cancellation or change of its registered office as required by the Act. In the exercise of the discretion of the court, I made no order as to costs.

Order accordingly.

Reported by Zarinah Marican